



LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF FRAUD AND CORRUPTION PROSECUTIONS
PUBLIC INTEGRITY DIVISION

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November 5, 2004

The Honorable Board of Supervisors
County of Los Angeles
383 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

Subject: Allegations of Brown Act Violations

Dear Members of the Board,

On September 21, 2004, this office received complaints alleging that the Los Angeles County Board of Supervisors ("Board") violated the *Brown Act* by illegally conducting closed session hearings on September 7, 2004, and September 13, 2004. We have investigated the allegations, and conclude that the Board violated the *Brown Act* when the closed sessions discussions exceeded the permissible parameters of Government Code Section 54956.9. Additionally, the Board violated the *Brown Act* when it reached apparent consensus on actions to be taken to save the Martin Luther King Drew Medical Center ("MLK") specifically regarding the closure of MLK Trauma, thereby "taking action" on a matter outside the scope of permissible subject matter during a closed session.

Materials reviewed during this inquiry include confidential documents related to the subject matter for consideration at the closed sessions that were voluntarily provided by the Board through the office of County Counsel for the sole purpose of facilitating our review of the allegations. The documents provided in response to our request dated September 22, 2004, included internal reports, external agency reports, memoranda, email and correspondence related to the subject set for consideration at the closed sessions as well as the Board memoranda regarding the proposed subject matter of the closed sessions and minutes from those sessions. All written materials thus provided were reviewed along with audio tape recordings of the closed sessions, which were made available to this office on October 4th and 5th. In addition, agendas, minutes, and other documents available to the public were considered. Acting County Counsel and his staff responded to our requests for information cooperatively, and provided additional information when requested as the inquiry proceeded. Representatives from CMS and JHACO were also contacted.

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We are unable to provide many of the factual bases for the conclusions articulated herein since, as a condition to the Office of County Counsel providing us with the closed session minutes, access to recordings of the closed session meetings, and other documents pertaining to the subject matter, we agreed to maintain their confidentiality, not disclose them to any person or entity and to limit use of those materials to our review of the validity of the allegations in this matter only.

APPLICABLE LAW

Government Code Section 54953(a) of the *Brown Act* requires that "(A)ll meetings of the legislative body of a local agency shall be open and public and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."

Government Code Section 54956.9 establishes the circumstances under which a legislative body can meet in closed session regarding pending litigation:

Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.

For purposes of this chapter, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter.

For purposes of this section, ***litigation shall be considered pending when any of the following circumstances exist:***

(a) Litigation, to which the local agency is a party, has been initiated formally.

(b) ***(1) A point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is significant exposure to litigation against the local agency.***

(2) Based on existing facts and circumstances, the legislative body of the local agency is meeting only to decide whether a closed session is authorized pursuant to paragraph (1) of this subdivision.

(3) For purposes of paragraphs (1) and (2) "existing facts and circumstances" shall consist only of one of the following:

(A) Facts and circumstances that might result in litigation against the local agency but which the local agency believes are not yet

known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed.

(B) Facts and circumstances, including but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the agency and that are known to a potential plaintiff or plaintiffs which facts or circumstances shall be publicly stated on the agenda or announced.

Public policy considerations support the confidentiality of information received and discussed in closed session, pursuant to the above cited statute.

Unless section 54956.9 were given a strained and unnatural construction, the wording of the statute permits individual members of a legislative body not only to deliberate and exchange opinions with counsel but also among themselves in the presence of counsel. As we noted in 69 Ops. Cal. Atty. Gen. 232, 239, the pending litigation exception fills the need to discuss confidentially with counsel "the strength and weakness of the" local agency's position in the litigation. And as articulated by the court in *Sacramento Newspaper Guild, Inc.* with respect to both "settlement and avoidance of litigation", these are "particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by indiscriminating insistence on open lawyer-client conferences."

80 Ops.Cal.Atty. Gen. 231

ANALYSIS

The matter set for consideration at the closed session on September 7, 2004, was properly placed on the closed session agenda because the matter falls within the "pending litigation" exception articulated in section 54956.9, cited above. The closed session on September 13, 2004, was a continuation of the first closed session. The subject matter for which it was noticed satisfied the requirements for closed session under the pending litigation exception and was therefore appropriate as well.

The scope of closed session discussions is limited to the subject matter authorized by statute. As articulated by the Attorney General, "those discussions must be confined to those authorized by section 54956.9, namely to receive advice from the city attorney and to confer with him or her regarding the pending litigation when discussion of those matters in open session would prejudice the position of the city in the litigation." 69 Ops.Cal.Atty.Gen. 232.

Similarly, the purposes of the exception is to permit the legislative body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach non-litigation oriented policy decisions. 71 Ops.Cal.Atty.Gen 96, 104-105.

Audio tape recordings of the initial closed session reveal that the discussions that ensued strayed from the permissible subject matter. Though factually related, matters discussed during the meeting went beyond the pending litigation exception that justified the closed session.

Discussions during the second closed session also exceeded the permissible parameters of the applicable privilege. In so doing, the Board considered matters that were not privileged and which should have been aired in an open and public meeting. We therefore conclude that the Board violated section 54953 of the *Brown Act* when the Board deliberated in closed session on matters outside the pending litigation exception.

Discussions during, and actions taken immediately following, the September 13th closed session lead to the reasonable conclusion that consensus was reached regarding action to be taken on a matter outside the privilege. Such action is a non-litigation oriented policy decision which does not fall within the confines of the pending litigation exception for which action in closed session might be justified. Consequently, the Board violated section 54953 of the *Brown Act* when it deliberated and reached consensus regarding a non-privileged policy decision during the closed session.

Such consensus is corroborated by the appearance of the Board at a press conference which was conducted after the second closed session adjourned. At the press conference, the proposal to close the King-Drew Trauma center was presented. An announcement issued by the Department of Health Services dated September 13, 2004, provides further corroboration: "(T)he County has taken the important step of phasing out King/Drew's trauma designation." While a "revised" announcement was subsequently issued by the same department on September 23rd, the import of the original announcement supports the conclusion that apparent consensus was reached outside the public view on a non-privileged matter in violation of Section 54953.

While demand for rescission of actions illegally taken is an available remedy, we decline at this time to make such a demand. There is no evidence that the Board intended to prevent the public from participating in the decision making process regarding the fate of the King-Drew Trauma facility, or that the Board or any of its members sought to subvert the public process protected by the *Brown Act* by taking action outside the scrutiny of a public meeting. Rather, the materials reviewed suggest that the Board fully intended to present the proposal for public comment at an open meeting and to vet the possibility of such closure at the earliest possible time. In fact, consideration of the closure of King Drew Trauma appeared on the agenda for the regular Board meeting on September 21, 2004.

We believe that an action seeking declaratory relief would confirm the conclusions reached herein. Such action is, in our judgment, unnecessary at this time because of the Board's previously demonstrated responsiveness to issues of compliance with the *Brown*

Act. Additionally, as a practical matter, the Board records its closed sessions voluntarily, rendering resort to further judicial remedies available under the *Brown Act* unnecessary.

Violation of the *Brown Act* impugns the integrity of and erodes public confidence in government. The nature and scope of the *Brown Act* violations cited herein cannot be minimized. While we acknowledge the measures this Board has voluntarily undertaken in the past to ensure compliance with the *Brown Act*, we urge the Board to revisit its commitment to the letter and the spirit of the *Brown Act* in order to maintain public confidence in its decision-making process. We are confident that compliance in all aspects of the *Brown Act* can be achieved voluntarily, through the cooperative efforts of our respective agencies.

Very truly yours,

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By 

JENNIFER LENTZ SNYDER
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Public Integrity Division

c: Each Supervisor
 Chief Administrative Officer
 County Counsel